



Agenda Date: 2/11/04
Agenda Item: 2A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

ENERGY

BEVIN CONSTRUCTION

v.

JERSEY CENTRAL POWER
AND LIGHT COMPANY

ORDER ADOPTING
INITIAL DECISION

DOCKET NO. EC02120936

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter involves the petition of Bevin Irvin Construction ("Petitioner" or "Bevin Construction") seeking a determination that Respondent Jersey Central Power & Light Company ("Respondent" or "JCP&L") should bear the expenses associated with relocating a utility pole approximately six inches, so that concrete curbing in front of the pole can be completed. Respondent has agreed to move the pole but contends that, under its Board-approved tariff, Petitioner is responsible for the cost of the relocation.

BACKGROUND

The pole in question, identified by Respondent as pole number 2465, is located in front of a home constructed by Petitioner in the year 2000. The street address of that home is 1605 Westfield Street, Ocean Township, New Jersey. JCP&L erected the pole in 1971 to facilitate the connection of electricity to the neighboring house, 1607 Westfield Street, which was newly constructed in 1971. At that time, number 1607 was the last house on Westfield Street, and the pole was erected in the undeveloped area beyond it to terminate the distribution line.

In 1988, Bevin Construction purchased the undeveloped land at what is now 1605 Westfield Street. In or shortly before 2000, Petitioner began construction of a new home there. At that time, Petitioner asked Respondent to move its pole, so that Petitioner would be able to finish the curb as required by the town. Petitioner subsequently sold the home in September 2000.

PROCEDURAL HISTORY

On December 19, 2002, Petitioner filed its Petition seeking an order directing Respondent to pay for the costs associated with relocating a utility pole. Respondent filed an Answer to the Petition on February 4, 2003. On or about February 27, 2003, the Board of Public Utilities transferred this case to the Office of Administrative Law for evidentiary hearings and determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. An evidentiary hearing was held on September 11, 2003, before the Honorable Douglas Hurd, Administrative Law Judge ("ALJ"). Respondent filed a post-hearing brief on September 25, and the record closed. The Board received the ALJ's Initial Decision by electronic transmission on November 7, 2003, the Board acknowledged receipt on November 10, and it was mailed to the parties on November 17, 2003. No Exceptions were filed by either party, and on December 17 the matter appeared on the Board's regularly scheduled Agenda. The Board found that the record, as it stood, was insufficient to support either an adoption or a rejection of the Initial Decision and, accordingly, the Board authorized the Secretary to send a letter to the parties and to the Township of Ocean, requesting that additional information be submitted.

FINDINGS OF FACT BY THE ALJ

When the house at 1607 Westfield Street was built in 1971, the paved portion of Westfield Street and the electric distribution service were extended down Westfield Street to accommodate the new house. This extension included placing the pole in question beside the unpaved portion of the street, in the then-undeveloped area beyond the new house. When Petitioner built a new house, now numbered 1605, in the year 2000, Ocean Township required Petitioner to pave the street and to complete the curb where the street was extended to serve house number 1605. Petitioner was required to put up a bond for these improvements. The present location of the pole has prevented Petitioner from completing the curb; in order for the curb to be completed, the pole must be moved approximately six inches away from the street, back toward the house. The Township has refused to return Petitioner's bond money because the curb is incomplete.

The ALJ found that the pole was located in a public right of way as defined at N.J.S.A. 48:3-17.2(b). Thus, relying on Port of New York Authority v. Hackensack Water Co., 41 N.J. 90, 96-97 (1963), the ALJ concluded that JCP&L's interest in the pole's location was subordinate to the public's interest in the use of a public street. He then found that under Pine Belt Chevrolet, Inc., v. Jersey Central Power & Light, 132 N.J. 564, 572 (1993), a utility company is required to pay the costs of relocation when the project necessitating the relocation benefits the public, even if the party actually responsible for the project is a private entity. Finally, he found that under Fellowship Bank v. Public Service Electric and Gas Co., 158 N.J. Super. 107, 109 (App. Div.), certif. denied, 77 N.J. 503 (1978), the refusal to return Petitioner's bond money constituted a direct order from the Township that the curbing be finished. He ruled that completion of the curb is an exercise of the municipality's police power over a public road and that, as such, the utility should bear the cost of relocating its property. He found that under this analysis, JCP&L's tariff does not control the assignment of costs. The ALJ ordered JCP&L to pay for the costs of relocation.

DISCUSSION

The Board concurs with the ALJ with respect to the paramount public interest in public roads, and also with the ALJ's analysis of Petitioner's role in installing the curb. Although a private individual, he is in this instance acting at the behest of the municipality. However, New Jersey precedent does recognize an exception to the general rule placing the pole-removal costs on utilities. The Appellate Division has ruled that, when utility property was placed alongside a road prior to the municipal possession of that road, the utility is not liable for the costs of moving that property. Sussex Rural Electric Coop. v. Township of Wantage, 217 N.J. Super. 481, 487 (App. Div. 1987).

The record as developed at hearing, however, did not address the question of Westfield Street's status at the time JCP&L placed its pole. No evidence or argument was provided on the question of whether the utility's placement of the pole pre-dated the Town's ownership of the road. Thus the Board could not make a determination as to whether the utility was required to pay for the pole's relocation and ruled that the record was insufficient to either affirm or reject the Initial Decision.

Accordingly, the Board retained jurisdiction and requested submissions from the parties on the narrow factual question of the status of Westfield Street in 1971. Petitioner Bevin Irvin subsequently submitted the following: two tax maps, dated 1958 and 1968, showing Westfield Street and its housing lots, a copy of the Right-of-Way agreement signed by JCP&L in 1971, allowing it to install Pole 2465, and a copy of a 1969 receipt from the Township of Ocean Sewerage Authority memorializing the installation of sewer service to Number 1620 Westfield Street, located across the street from Number 1607. Petitioner argues that the provision of sewer service by Ocean Township to a house located across the street from Number 1607 indicates that the town owned the street. He points to the Sewerage Authority receipt as evidence of installation and to the tax maps as documentation of the location of Numbers 1607 and 1620. In addition, Petitioner references his exhibit P-2, an approved site map of the area filed in 1920, which he offers as evidence of the Town's claim to the street (P-2, T-7, 8)¹

The Board FINDS that the full record in this matter supports Petitioner's claim that the Town owned Westfield Street in 1971. Moreover, Respondent JCP&L has submitted nothing that might tend to support the opposite view. Based on the entire record in this matter, the Board FINDS that the street belongs to the Town. Thus the utility's interest in its property must yield to the public's interest.

¹ Petitioner also continues to make the same assertions about the allegedly improper placement of the pole that he made at hearing, but the Initial Decision, the Board's December 17, 2003 Order, and the Secretary's letter to which Petitioner now responds do not address that issue and it is thus not necessary or appropriate to reach it now.

CONCLUSION

For all of the above stated reasons, this Board HEREBY ADOPTS the Initial Decision issued by ALJ Hurd on November 7, 2003 on the basis of the record as supplemented. Therefore, the Board HEREBY ORDERS JCP&L to move the pole to a location six inches behind the current curb line and to pay all costs associated therewith.

DATED: 2/11/04

BOARD OF PUBLIC UTILITIES
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KRISTI IZZO
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SERVICE LIST

Nusha Wyner, Esq.
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

George Riepe
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Carl Dzierzawiec
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Tirza Wahrman, Esq.
Division of Law
PO Box 45029
Newark, NJ 07101

Amy Motzenbecker, Esq.
Thelen Reid & Priest LLP
65 Madison Avenue
Morristown, NJ 07960

Michael Filippone
Jersey Central Power & Light Co
PO Box 1911
Morristown, NJ 07962-1911

Bevin Irvin
Bevin Construction
1807 Finderne Street
Oakhurst, New Jersey 07755